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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DAVID JOHNSON, Defendant and Appellant.	G040319 (Super. Ct. No. RIF108341) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Vernon Nakahara, Judge. Affirmed in part, reversed in part and remanded.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Theodore M. Cropley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Robert David Johnson guilty of first degree residential robbery (Pen. Code, §§ 211, 213, subd. (a)(1)(A); all statutory citations are to the Penal Code unless indicated), two counts of felon in possession of a firearm (§ 12021, subd. (a)(1)), false impersonation (§ 529, subd. 3), possession of counterfeit bills (§ 476), and two counts of dissuading a witness (§ 136.1, subd. (a)(1)). The jury also found to be true the allegation a principal used a firearm during commission of the robbery (§ 12022.53, subds. (b) & (e)) and that defendant committed the crimes of robbery and dissuading a witness to benefit a criminal street gang. The trial court found defendant previously suffered a prior serious felony conviction within the meaning of the Three Strikes law and section 667, subdivision (a)(1), and had served a prior prison term (§ 667.5, subd. (b).) Defendant challenges the sufficiency of the evidence to sustain one of the counts of witness dissuasion and its accompanying gang enhancement. He also contends the trial court erred by admitting a nontestifying victim's pretrial statement to a police detective, and argues the trial court committed various sentencing errors. We reverse in part as explained below.

I

FACTUAL AND PROCEDURAL BACKGROUND

Felon in Possession of a Firearm (Count 6)

Defendant was a criminal street gang participant who had served time in prison for shooting Torrey Goodwin, a member of a rival gang, in 1995. On January 12, 2003, defendant waved a gun around while using methamphetamine at Greg Huddleston's Riverside apartment.

Residential Robbery (Count 1); Felon in Possession of a Firearm (Count 2)

On January 26, 2003, defendant returned to Huddleston's apartment with gang affiliates Fred Guevara, Matthew Fulton, Jared Winfrey and Juan Avila. Defendant told the others beforehand Huddleston owed him money and he intended to take Huddleston's television and stereo equipment. They encountered Huddleston and Huddleston's neighbor in the parking lot. Defendant, who had a gun in his waistband, told Huddleston they needed to hide from the police in Huddleston's apartment. Huddleston initially refused, until defendant told him they had guns and warned they would force him if he did not agree. When they entered the apartment defendant gave Huddleston a gun, apparently belonging to Winfrey, to put him at ease.

The group drank and used methamphetamine and marijuana late into the evening. Later, defendant and Huddleston went outside to wait for defendant's ride home. Two of defendant's friends, men with shaved heads, arrived. Defendant directed them to Huddleston's apartment to round up the others. Huddleston and defendant also returned to the apartment. Once inside, one of defendant's cohorts ran at Huddleston with the handgun defendant had given Huddleston earlier, ordered him into the bedroom, told him to get on his knees and remove his clothes, and put a shirt over his head. The others stole Huddleston's television, stereo and video equipment, digital camera, photographs, and other items. After defendant's associates left, defendant pretended the others had acted without his knowledge and assured Huddleston he would recover the property. Defendant tried to talk Huddleston out of calling the police, explaining this would cause him trouble because he was on parole.

False Impersonation (Count 3); Possession of Counterfeit Bills (Count 4)

After the Huddleston robbery, police secured an arrest warrant for defendant. On the morning of August 18, 2004, defendant was a passenger in a car stopped by Riverside police. Defendant identified himself as Dominic Talley and produced Talley's driver's license, but the police officer recognized defendant and arrested him. During a booking search, police discovered three counterfeit bills in defendant's possession.

Dissuading a Witness (Count 5)

At defendant's first trial, to prove the gang enhancement, the prosecution called Torrey Goodwin to testify that defendant shot him in a 1995 gang-related assault. Defendant anticipated the prosecution planned to have Goodwin testify again at defendant's upcoming trial.

On June 20, 2005, authorities surreptitiously recorded defendant's jailhouse phone call to Veronica House. Defendant directed House to call the jail to see if Torrey Goodwin was incarcerated. House replied she had seen Goodwin in the courthouse with the prosecutor's investigator earlier in the day. Defendant told her, "Well, and ask him straight up what he's going to say. Tell, just, to just walk right up to him and just tell him, hey look it, man, when you get up on the stand, dude, you just tell them, dude that you fucking pointed the finger at the wrong man, dude, and you've got nothing more to say, get off the fucking stand." Defendant also asserted Goodwin had falsely accused him and she should provide the message even if the prosecutor was present.

Dissuading a Witness (Count 7)

Detective James Simons testified he interviewed Goodwin on October 5, 2005. Goodwin told him that on September 25, 2005, defendant approached him in the

jail and directed him to "plead the Fifth" when called to testify in defendant's case. Goodwin revealed the comment upset him because defendant had shot him previously. The court admitted Simon's testimony after Goodwin violated a court order and refused to answer questions about the incident at trial.

Defendant's first trial resulted in a mistrial. Following retrial in October 2007, a jury convicted defendant of the crimes and enhancements listed above. The trial court found the prior conviction allegations to be true and imposed a determinate term of 20 years followed by an indeterminate term of 44 years to life.

II

DISCUSSION

A. *The Evidence Is Insufficient to Sustain the Conviction for Dissuading a Witness Charged in Count 5*

Defendant challenges the sufficiency of the evidence to support the conviction for witness dissuasion charged in count 5. (§ 136.1, subd. (a)(1).)[1] The count concerned Veronica House's testimony defendant directed her to tell Goodwin to testify that Goodwin had "pointed the finger at the wrong man." Defendant argues there is no evidence he had the specific intent to prevent Goodwin from attending or giving testimony. (*People v. Womack* (1995) 40 Cal.App.4th 926, 930.) The Attorney General concedes the issue, and we accept the concession.

The test on review for sufficiency of the evidence is whether the record """"discloses substantial evidence — that is, evidence which is reasonable, credible, and

[1] Section 136.1, subdivision (a)(1), provides: "(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison: [¶] (1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law."

of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" . . ." (*People v. Elliott* (2005) 37 Cal.4th 453, 466; *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [test for sufficiency is whether, viewing evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt].)

Here, the evidence reflects at most defendant improperly attempted to *influence* Goodwin's testimony (see § 137 [knowingly inducing a person to give false testimony or withhold true testimony]; see also § 127 [suborning perjury]), not that he prevented or dissuaded a witness from attending or giving that testimony. Consequently, count 5 and its associated gang enhancement (§ 186.22, subd. (b)) must be reversed.

B. *The Trial Court Erred in Admitting Goodwin's Pretrial Statements to Prove the Dissuading a Witness Charge in Count 7*

Defendant contends we must reverse his conviction in count 7 for dissuading Goodwin from testifying because the trial court erred in admitting Goodwin's pretrial statements to Detective Simons. Specifically, defendant argues admission of these statements violated his Sixth Amendment right to confront witnesses against him. He also asserts Simons's testimony reciting what Goodwin told him about defendant's directive not to testify constituted inadmissible hearsay. We agree with the latter point.

At trial, Goodwin refused to answer most questions asked by either the prosecutor or defense counsel. The prosecutor thereafter introduced Goodwin's prior testimony from an earlier trial, where Goodwin described how defendant shot him in an altercation occurring in 1995. The prosecutor then sought to have Simons testify that on October 5, 2005, Goodwin told Simons that defendant 10 days earlier approached him in jail and directed him to "plead the Fifth" when called to testify at defendant's trial. Goodwin allegedly told Simons defendant's statement upset him because defendant had

shot him in 1995. The trial court overruled defendant's Sixth Amendment objection, finding defendant forfeited his right to confrontation when he dissuaded Goodwin from testifying. The court also overruled defendant's hearsay objection, finding the statements presented "particularized guarantees of trustworthiness."

Forfeiture by wrongdoing is an equitable doctrine based on the principle that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." (*Davis v. Washington* (2006) 547 U.S. 813, 833.) To invoke the doctrine, the prosecution must first establish through independent corroborative evidence that the defendant acted with the purpose or intent of preventing the witness from testifying. (*Giles v. California* (2008) ___ U.S. ___ [128 S.Ct. 2678, 2683-2684]; *People v. Osorio* (2008) 165 Cal.App.4th 603, 611.) But "even if it is established that a defendant has forfeited his or her right of confrontation, the contested evidence is still governed by the rules of evidence; a trial court should still determine whether an unavailable witness's prior hearsay statement falls within a recognized hearsay exception. . . . " (*People v. Giles* (2007) 40 Cal.4th 833, 854 (*Giles*), overruled on another point in *Giles v. California*, *supra*, at pp. 2683-2684.)

Here, the trial court found the prosecution satisfied its burden to show by a preponderance of the evidence defendant caused the witness's unavailability.[2] The court

[2] In *Giles*, *supra*, 40 Cal.4th 833, the California Supreme Court held a defendant forfeits the right to confrontation when the defendant's criminal act caused the witness's unavailability, whether or not the defendant specifically intended to prevent the witness from testifying. (*Id.* at p. 849.) At the evidentiary hearing to determine whether defendant forfeited his confrontation rights, the trial court followed *Giles*, stating the "issue is whether defendant did, in fact, cause Mr. Goodwin to refuse to testify." After defendant's trial, however, the United States Supreme Court overturned the *Giles* decision, holding that the forfeiture by wrongdoing exception applies only if the defendant "'engaged or acquiesced in wrongdoing that was *intended* to, and did, procure the unavailability of the declarant as a witness.'" (*Giles v. California*, *supra*, 128 S.Ct. at p. 2687, italics added.)

also overruled defendant's hearsay objection and admitted Goodwin's pretrial statements to Simons. We conclude the court erred in allowing Simons to testify that Goodwin told him that 10 days earlier defendant had directed Goodwin not to testify. Because the admission of this hearsay evidence constitutes prejudicial error requiring reversal of defendant's conviction for dissuading a witness, we need not determine whether the court's forfeiture ruling violated his Sixth Amendment right to confrontation.

Hearsay is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is not admissible unless it "meets the requirements of an exception to the hearsay rule." (Evid. Code, § 1201.) We apply these general rules to the two statements at issue in this appeal.

The first statement we consider is defendant's jailhouse directive to Goodwin to "plead the Fifth." Defendant concedes the statement to Goodwin does not constitute hearsay because "a request, by itself, does not assert the truth of any fact, [therefore] it cannot be offered to prove the truth of the matter stated." (*People v. Jurado* (2006) 38 Cal.4th 72, 117; *People v. Reyes* (1976) 62 Cal.App.3d 53, 67 ["words of direction or authorization do not constitute hearsay since they are not offered to prove the truth of the matter asserted by such words"].) Goodwin could have testified defendant pressed Goodwin not to testify because defendant's statement to Goodwin did not constitute hearsay, and because Goodwin personally heard defendant make the statement.

When Goodwin refused to testify, the prosecution introduced the second statement under review: Goodwin's report to Simons that 10 days earlier, defendant told Goodwin to "plead the Fifth." Simons also testified that Goodwin told Simons that he became upset when defendant told him not to testify.

Defendant contends Simons's testimony reciting Goodwin's claim defendant directed him not to testify "was necessarily offered for the truth of the matter asserted — to prove that [defendant], in fact, told him to 'plead the Fifth' — because if not offered for that purpose then there was no evidence [defendant] made that statement and, consequently, no evidence of witness dissuasion to support the conviction in count [7]." We agree. Goodwin's statement to Simons is hearsay because it asserts that defendant made the statement to Goodwin, a matter offered for its truth. Thus, admission of Goodwin's hearsay statement to Simons constituted error unless the statement fell within an exception to the hearsay rule. (Evid. Code, § 1201.)

The Attorney General argues Goodwin's statements qualify for admission under the state of mind hearsay exception found in Evidence Code section 1250, subdivision (a)(2).[3] This exception allows "evidence of a declarant's statements regarding his or her then existing state of mind or emotion, when the *declarant's* state of mind or emotion is at issue in the case, or when the evidence is offered to prove or explain the *declarant's* acts or conduct." (*People v. Ruiz* (1988) 44 Cal.3d 589, 608, original italics.) The statement, according to the Attorney General, falls within the exception because Goodwin's comments revealed his then existing state of mind, which explained his subsequent conduct in refusing to testify.

The Attorney General's argument, however, fails to account for that part of Goodwin's statement that does not reflect Goodwin's emotional state, namely, that defendant told him not to testify. A hearsay statement offered to prove the conduct of

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[3] Evidence Code section 1250, subdivision (a)(2) provides: "[E]vidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when[] [¶] the evidence is offered to prove or explain acts or conduct of the declarant."

someone other than the declarant is not admissible under the state of mind hearsay exception embodied in Evidence Code section 1250. (*People v. Noguera* (1992) 4 Cal.4th 599, 622 (*Noguera*).) The state of mind hearsay exception provides for admissibility of only those statements of the declarant that "relate to a condition of mind or emotion existing at the time of the statement." (2 McCormick, Evid. (5th ed. 1999) Hearsay, § 274, p. 217.) Goodwin's assertion defendant told him not to testify is not a statement of Goodwin's "then existing state of mind, emotion or physical sensation," as required under Evidence Code section 1250, subdivision (a). Rather, it is a statement derived from Goodwin's memory because Goodwin asserted defendant made the statement 10 days earlier. A statement of memory or belief to prove the fact remembered or believed is inadmissible per Evidence Code section 1250, subdivision (b).[4] As the Law Revision Commission comment explains, "This limitation is necessary to preserve the hearsay rule. Any statement of a past event is, of course, a statement of the declarant's then existing state of mind — his memory or belief — concerning the past event. If the evidence of that state of mind — the statement of memory — were admissible to show that the fact remembered or believed actually occurred, any statement narrating a past event would be, by a process of circuitous reasoning, admissible to prove that the event occurred." (Cal. Law Rev. Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 1250, p. 281.)

The Attorney General disputes that Goodwin's statements are severable, arguing that Goodwin's statement to Simons falls within the state of mind exception because "it is apparent from Detective Simons'[s] testimony that he interviewed

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[4] Evidence Code section 1250, subdivision (b), provides: "This section does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed."

Goodwin once on October 5, 2005, and Goodwin told him during that interview that [defendant] told Goodwin to 'plead the Fifth' and this statement upset him because [defendant] had previously shot him."[5] We disagree with the implications in this argument.

It is elemental that all the statements of a hearsay declarant do not automatically qualify for admission merely because they occurred in a single conversation. As for the statements, all are severable and therefore each statement must be analyzed separately to determine whether it falls within a hearsay exception. (*People v. Reed* (1996) 13 Cal.4th 217, 224-225.) The words directing Goodwin not to testify are not hearsay, and Goodwin's words explaining his then-existing emotional state to Simons fall within the state of mind hearsay exception. But Goodwin's statement to Simons that defendant was the person directing him not to testify was offered separately to prove defendant spoke the words that demonstrated his attempt to dissuade Goodwin from testifying.

The Attorney General's argument the statement identifying defendant as the speaker could not be severed from Goodwin's statement describing his mental state is unavailing for other reasons. As noted, the state of mind hearsay exception is not a license to prove the conduct of a third party. (*Noguera, supra,* 4 Cal.4th at p. 622.) Moreover, the trial court did not expressly admit the evidence under the state of mind exception. Rather, the court found the statement was trustworthy and admitted it for all purposes. We are aware of no such generalized exception. We therefore conclude the trial court erred in admitting Goodwin's hearsay statement to Simons identifying defendant as the person who directed him not to testify. Because Goodwin's statement

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[5] The quotation is the extent of the Attorney General's argument on this issue.

was the only evidence showing defendant attempted to dissuade Goodwin from testifying, its admission constitutes reversible error.

C. *Reversal of Defendant's Convictions for Dissuading a Witness Does Not Require Overturning His Convictions on the Remaining Counts*

Defendant contends the cumulative errors requiring reversal of his convictions for dissuading a witness mandate reversal of all his convictions on the remaining counts. Specifically, defendant argues the admission of evidence he attempted to dissuade Goodwin from testifying "portrayed him as a bad person" and therefore violated his due process right to a fair trial. We are not persuaded.

A "series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844.) The issue is not whether the defendant received an error-free and perfect trial, which is rarely, if ever achieved, but whether his guilt on the charge was "fairly adjudicated." (*Ibid.*; *United States v. Hasting* (1983) 461 U.S. 499, 508-509.) We must affirm "absent a clear showing of a miscarriage of justice." (*Hill*, at p. 844.)

Defendant includes in his cumulative error claim the insufficiency of the evidence to support count 5, which rested on evidence defendant had directed House to contact Goodwin and tell him he had misidentified defendant as his assailant. For the reasons discussed above, we agree the prosecution failed to support the charge with substantial evidence. But this does not mean the trial court erred, based on the record before us. Indeed, defendant points to no error by the trial court in permitting the charge to be tried or to go to the jury. Defendant did not object to the prosecution's evidence, nor did he ask the court to acquit him at the close of the prosecution's case. (§ 1118.1; cf. *People v. Partida* (2005) 37 Cal.4th 428, 435 ["A party cannot argue the court erred in

failing to conduct an analysis it was not asked to conduct"].) Defendant does not suggest the trial court should have dismissed the charge sua sponte, nor does he allege prosecutorial misconduct in presenting insufficient evidence. No error on the court's part brought about defendant's conviction; therefore, there is no additional error to cumulate with the court's failure to sustain defendant's hearsay objection that resulted in his conviction on count 7. Absent multiple errors to cumulate, the cumulative error doctrine does not apply. (*People v. Staten* (2000) 24 Cal.4th 434, 464.)

D. *The Trial Court Did Not Err in Imposing a Life Term Under Section 186.22, Subdivision (b)(4), and Declining to Impose the 10-Year Enhancement under Section 12022.53*

Defendant contends the trial court erred when it sentenced him to an indeterminate term of 15 years to life, doubled to 30 years to life under the Three Strikes law, for residential robbery pursuant to section 186.22, subdivision (b)(4). This section mandates the imposition of a potential life sentence when the defendant commits a home invasion robbery to benefit a criminal street gang. Defendant argues the trial court was required to impose a 10-year gun use enhancement under section 12022.53 in lieu of sentencing under section 186.22. The Attorney General argues the trial court was required to impose the indeterminate life term *and* the 10-year gun use enhancement.

Following briefing in this case, the California Supreme Court interpreted section 186.22 to bar a trial court from imposing *both* the penalty of a life term under section 186.22, subdivision (b)(4), and the 10-year enhancement under section 12022.53. (*People v. Brookfield* (2009) 47 Cal.4th 583.) In choosing which of the two provisions to impose, the trial court must choose the provision which carries the greater sentence. (*Id.* at p. 596.) In *Brookfield*, and in the present case, the greater sentence was the

indeterminate term imposed under section 186.22. Consequently, the trial court did not err in striking the 10-year sentence under section 12022.53.

E. *The Trial Court Erred in Imposing Consecutive Sentences on Counts 3 and 4 Because They Occurred on the Same Occasion*[6]

The court ordered all determinate terms to run consecutively, finding that defendant committed each offense on a separate occasion under section 1170.12, subdivision (a)(6). That section provides, "If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court shall sentence the defendant consecutively on each count pursuant to subdivision (e)." (Accord, § 667, subd. (c)(6).) Defendant argues the trial court erred in imposing consecutive sentences on counts 3 (false impersonation)[7] and 4 (forgery by possession of fictitious bill)[8] because insufficient evidence demonstrated

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[6] Defendant initially contended the trial court erred by imposing a consecutive sentence based on aggravating factors not found to be true by the jury. He concedes in his reply brief both the United States and California Supreme Courts have held that the Sixth Amendment does not apply to a trial court's determination to impose a consecutive sentence. (*Oregon v. Ice* (2009) 555 U.S. ___ [172 L.Ed.2d 517, 129 S.Ct. 711]; *People v. Black* (2007) 41 Cal.4th 799, 820-823.)

[7] Section 529 provides, "Every person who falsely personates another in either his private or official capacity, and in such assumed character either: [¶] 3. Does any other act whereby, if done by the person falsely personated, he might, in any event, become liable to any suit or prosecution, or to pay any sum of money, or to incur any charge, forfeiture, or penalty, or whereby any benefit might accrue to the party personating, or to any other person; [¶] Is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the state prison, or in a county jail not exceeding one year, or by both such fine and imprisonment."

[8] Section 476 provides, "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery."

these counts occurred on separate occasions. "[Defendant] was found to have impersonated Dominic Talley on August 18, 2004. . . . He was arrested and, during the booking process that same day, found in possession of counterfeit money, an act that formed the basis for his conviction in count 4. . . . Obviously, [defendant] was in possession of the money at the time of his impersonation just prior to his arrest. [¶] Although the evidence demonstrated that he was still in possession of it after his arrest, there was no evidence that he had admitted to the officer his true identity after his arrest. In fact, the officer testified that he identified [defendant] from his tattoos rather than an admission and that [defendant] never admitted that Talley's driver's license he produced as identification was not his. . . . Thus, not only did his possession continue but also so did his act of false impersonation. Therefore, those two offenses occurred on the same occasion."

The Attorney General counters defendant committed the crimes on separate occasions because defendant had completed the crime of false impersonation when officers arrested him, but his possession of counterfeit money was not discovered until he was booked into jail later. The record supports defendant's contention a mandatory consecutive sentence was not required.

In determining whether the Three Strikes law required mandatory consecutive sentences under section 1170.12, subdivision (a)(6), the California Supreme Court concluded the term "same occasion," refers "at least to a close temporal and spatial proximity between the acts underlying the current convictions." (*People v. Deloza* (1998) 18 Cal.4th 585, 595.) In *Deloza*, the defendant entered a furniture store and committed four robberies essentially simultaneously by taking the belongings of four victims in quick succession. "Given the close temporal and spatial proximity of

defendant's crimes against the same group of victims," the court determined the offenses occurred on the same occasion within the meaning of the Three Strikes law. (*Id.* at pp. 596, 599.)

In *People v. Lawrence* (2000) 24 Cal.4th 219, the Supreme Court again determined whether mandatory consecutive sentences were required under the Three Strikes law. There, the defendant shoplifted a bottle of brandy from a grocery store and fled on foot to a nearby neighborhood, where he jumped a backyard fence. The homeowner, wielding a shovel, chased him back over the fence, tackled him, and the two men grappled until the homeowner's fiancée approached with a baseball bat. The defendant struck the fiancée in the head with the brandy bottle before the police arrived and subdued him. (*Id.* at p. 224.) The court concluded the aggravated assault upon the fiancée, perpetrated two to three minutes after the theft from the market, at a location one to three blocks away, was not committed on the same occasion as the theft. (See also *People v. Durant* (1999) 68 Cal.App.4th 1393, 1404 [crimes occurred on separate occasions where the defendant entered a housing complex, unsuccessfully attempted to burglarize one home, walked to another residence where he again unsuccessfully attempted a burglary, and then walked to another residence and burglarized the home]; *People v. Jenkins* (2001) 86 Cal.App.4th 699, 707 [separate occasions when defendant pushed first victim downstairs, walked downstairs to rummage through the kitchen for a knife, then returned to stab the second victim].)

With these principles in mind, we turn to the present case. The evidence in the record conclusively demonstrates defendant possessed the counterfeit bills at the same time he falsely impersonated himself to the police officer. It makes no difference whether the officer discovered the evidence during a subsequent booking search rather

than at the time of defendant's arrest. The facts here do not show the requisite separation in space and time to support a conclusion defendant's crimes required a mandatory consecutive sentence. Consequently, the trial court possessed discretion to impose concurrent terms for these convictions.

At sentencing, the trial court explained its decision to impose consecutive sentences: "And these counts *shall* run consecutively, *because under [section] 1170.12[, subdivision] (1)(6)*, each offense was on a separate . . . occasion." (Italics added.) The court's sentencing statement reflects it felt bound to impose consecutive sentences under the Three Strikes law. Because we cannot discern from the record whether the trial court would have chosen to impose consecutive sentences had it been aware of its discretion, we must remand the case to the trial court for this limited determination. (See *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228-1229 [noting generally when record shows trial court proceeded with sentencing on erroneous assumption it lacked discretion, remand is necessary because a court that is unaware of its discretionary authority cannot exercise its informed discretion].)

F. *The Trial Court Did Not Prejudicially Err by Imposing the Upper Term Sentence on Count 2*

Defendant next contends the trial court erred when it imposed a three-year upper term, doubled to six years under the Three Strikes law, on count 2, felon in possession of a firearm. To support the upper term, the trial court found the following aggravating factors: defendant had suffered numerous prior convictions as an adult of an increasingly more serious nature; defendant was armed during the offense; he induced others to participate in the crime; and the crime indicated planning and sophistication. Defendant correctly notes the inducement and sophistication factors did not apply to the conviction for possessing a firearm charged in count 2. (*People v. Williams* (1984)

157 Cal.App.3d 145, 156 [crime-related facts used to aggravate a defendant's sentence must be relevant to each specific count]; *People v. Price* (1984) 151 Cal.App.3d 803, 812.) Defendant also argues the court violated the prohibition against dual use of facts when it imposed the upper term for being armed with a firearm and having prior convictions because these facts constituted elements of the crime. (Cal. Rules of Court, rule 4.420(d).) He acknowledges trial counsel failed to object, which ordinarily forfeits a claim of discretionary sentencing error on appeal (*People v. Scott* (1994) 9 Cal.4th 331, 353), but asserts trial counsel's failure to do so violated his right to the effective assistance of counsel and therefore requires us to remand the matter for resentencing.

To establish a claim of ineffective assistance of counsel, defendant must show his attorney's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Prejudice is shown only if there is a reasonable probability of a more favorable result, defined as a probability sufficient to undermine confidence in the outcome. (*In re Clark* (1993) 5 Cal.4th 750, 766.) In considering an ineffective assistance claim, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland*, *supra*, at p. 697; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) We follow this course and consider whether there exists a reasonable probability defendant would have received a more favorable sentence had counsel lodged a timely objection.

The prosecution relied on defendant's 1996 conviction for assault with a firearm to prove defendant's status as a felon, a necessary element in the crime of felon in

possession of a firearm charged in count 2. The court therefore could not also use this conviction to impose an aggravated term. The court, however, relied on defendant's other convictions to impose the upper term, finding them to be numerous and increasingly more serious. Defendant contends this determination is included within the definition of "the fact of a prior conviction" based on the holding in *People v. Black* (2007) 41 Cal.4th 799, 818-820.) We do not agree. *Black* followed United States Supreme Court precedent and found that the right to a jury trial did not apply to the fact of a prior conviction. (*Id.* at p. 818.) *Black* concluded the prior conviction exception included a determination whether the prior convictions were numerous or of increasing seriousness. (*Id.* at pp. 818-820.) Whether the number and nature of a defendant's prior convictions fits within the prior conviction exception to a defendant's constitutional right to a jury trial is a different inquiry than whether a trial court has aggravated a sentence based on the same fact to prove an element of the offense. The nature and number of defendant's other convictions are simply not elements of the crime of felon in possession and therefore the court's reliance on these factors did not violate the prohibition against dual use.

The trial court should not have relied on the remaining factors, however. Being armed during the offense of felon in possession of a firearm is an element of the crime and therefore the court cannot again use this fact to aggravate the sentence. And, as noted above, the inducement and sophistication factors do not apply to the felon in possession charge in count 2, which occurred several weeks before the residential robbery. We therefore consider whether the trial court would have imposed a lesser sentence had it known it could not rely on these factors to aggravate defendant's sentence. (*People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both

proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper"]) A single aggravating circumstance is sufficient to support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

We conclude it is not reasonably probable the trial court would have imposed a lesser term had it known some of the aggravating factors it relied on were improper. Defendant's prior convictions were numerous and included assault, weapons possession, driving under the influence, and theft-related crimes. His record revealed gang ties and demonstrated he posed a continuing threat of violence. Moreover, defendant committed the instant offenses while on probation, another factor supporting an upper term. The court did consider a mitigating factor, that "someone else had brandished the firearm at the victim, and the defendant did step in between those two people to perhaps prevent further harm," but the trial court's comments convey an intention to impose the upper term. We therefore conclude the trial court most likely would have imposed the upper term based on valid aggravating factors. Consequently, any error was harmless.

G. *Reduction of the Fine Imposed under Section 1202.5 Is Required*

Finally, defendant argues the trial court imposed an unauthorized local crime prevention program fine of $52.60 pursuant to section 1202.5. The Attorney General concedes the error. Section 1202.5, subdivision(a), provides in relevant part that "In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed." The

section permits only a single $10 fine in any case. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) Based on our review of the probation report, the trial court's fine evidently incorporated some of the myriad penalty assessments that have sprung up in various provisions of the Government Code and elsewhere. (See, e.g., Gov. Code, § 76000 et seq.) But the court did not articulate the basis for their inclusion. We modify the judgment to reduce the fine to the statutory amount without prejudice to the trial court correcting any unauthorized sentence by imposing statutorily required assessments.

III

DISPOSITION

The convictions for witness dissuasion (§ 136.1, subd. (a)(1)) in counts 5 and 7 are reversed. The portion of the sentence imposing consecutive sentences on count 3 (false impersonation; § 529, subd. (3)) and count 4 (possession of counterfeit bills; § 476) is reversed, and the matter is remanded for the court to determine whether to impose concurrent or consecutive sentences for those counts. The section 1202.5 fine is reduced to $10. (§ 1260.) Following resentencing, the trial court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

BEDSWORTH, J.